

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

PACIFIC GAS AND ELECTRIC COMPANY)

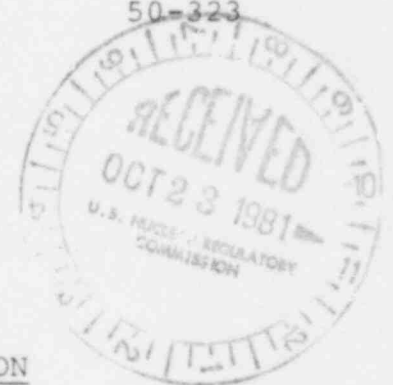
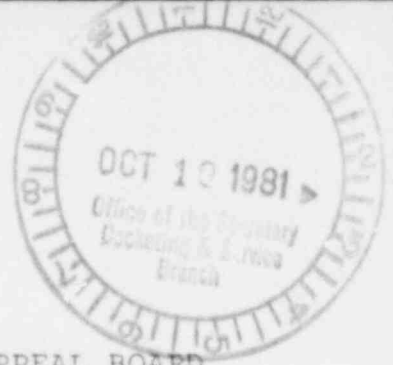
(Diablo Canyon Nuclear Power)
Plant, Units 1 and 2))

Docket Nos. 50-275
50-323

OPPOSITION OF LICENSEE PACIFIC
GAS AND ELECTRIC COMPANY TO
MOTION OF GOVERNOR EDMUND G.
BROWN JR. TO STRIKE PORTION OF
PGandE'S OPPOSITION TO STAY MOTION

Governor Brown's motion to limit the permissible scope of this Appeal Board's consideration of matters relevant to a determination (and rejection) of the stay motion pending before this Board is, stated simply, meritless. There is absolutely no question that this Board may refer to matters outside the adjudicative record supporting the Atomic Safety and Licensing Board's ("ASLB") decision authorizing issuance of a low power license to Pacific Gas and Electric Company ("PGandE") in considering whether to grant or deny a motion to stay the effectiveness of the ASLB's low power decision.

The Governor apparently recognizes that the FEMA report PGandE appended to its Opposition To Joint Intervenors' Application For A Stay (Exhibit B) weighs



1 heavily against his argument that he will suffer irreparable
2 injury because of alleged inadequate emergency preparedness
3 for low power testing. Motion of Governor Edmund G. Brown
4 Jr. For Stay Of The Effectiveness Of The Diablo Canyon Fuel
5 Loading And Low Power Operating License at 6-7 (Sept. 11,
6 1981). The fact, however, that the Governor does not like
7 this evidence does not provide a basis for striking it.
8 According to the Commission's own regulations, it is legally
9 proper for this Board to consider the FEMA report in
10 evaluating at least three of the four stay criteria set
11 forth in 10 C.F.R. § 2.788(e). Common sense dictates the
12 same result.

13 10 C.F.R. § 2.788 sets forth the procedure to be
14 followed in applying for and resisting applications to stay
15 licensing decisions. This procedure permits evidence
16 outside the adjudicative record to be considered by this
17 Board in determining whether to grant or deny a stay
18 application. For example, section 2.788 provides in part as
19 follows:

20 An application for a stay shall be no
21 longer than ten (10) pages, exclusive of
22 affidavits, and shall contain the
following:

23 * * *

24 (4) To the extent that an application
25 for a stay relies on facts subject to
dispute, appropriate references to the
26 record or affidavits by knowledgeable
persons. [10 C.F.R. § 2.788(b)(4);
emphasis added.]

1 The Governor himself has utilized this procedure by basing
2 his stay motion in part on an affidavit raising matters
3 outside the low power record. See PGandE's Opposition To
4 Motion Of Governor Edward G. Brown Jr. For Stay Of The
5 Effectiveness Of The Diablo Canyon Fuel Loading And Low
6 Power Operating License at 4-7 (Sept. 17, 1981).

7 Further, the criteria governing stay motions
8 require this Board to consider issues not necessarily
9 directly relevant to a licensing board's licensing decision.

10 The four criteria are:

- 11 (1) Whether the moving party has made a
12 strong showing that it is likely to
prevail on the merits;
- 13 (2) Whether the party will be irrepar-
ably injured unless a stay is granted;
- 14 (3) Whether the granting of a stay
would harm other parties; and
- 15 (4) Where the public interest lies.
[10 C.F.R. § 2.788(e).]

16 The resolution of all but the first factor may well require
17 reference to outside evidence since there may be nothing in
18 the low power record enabling this Board to make the
19 required determination.

20 There is no question that the FEMA report is
21 proper and admissible evidence. 10 C.F.R. §§ 2.743(c), (h)

22 ///

23 ///

24 ///

1 and (i); Fed. R. Evid. 402 and 803(8). 1/ The report is
2 relevant to at least three of the four stay factors (section
3 2.788(e)(2-4)), particularly in demonstrating that
4 permitting the low power license to remain effective will
5 not cause irreparable injury to the Governor nor harm to
6 other persons.

7 Additionally, it makes no sense for this Board to
8 be prevented from evaluating all pertinent and relevant
9 information when it decides the stay motions. Although
10 Governor Brown continually argues that the emergency
11 response planning for Diablo Canyon is insufficient, when a
12 report is issued that contradicts that assertion his

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14 ///

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18 1/ The Governor's citations (motion at 2) underscore the
19 speciousness of his motion. He cites 10 C.F.R. Part 2,
20 App. A, § (v)(e)(2), which by its terms applies only to
21 the conduct of licensing proceedings by licensing
22 boards. The "decision" referred to is obviously
23 (except perhaps to the Governor) a licensing decision,
24 and not action on a stay motion by an appeal board,
25 which is governed instead by 10 C.F.R. § 2.788.
26 Similarly, the two cited cases do not discuss the
matters which may be considered on applications for
provisional relief, but simply state that an
administrative agency should not stray beyond the
record in making a decision on the merits of a license
application. That is not the situation here. Compare
5 U.S.C. § 556(e) with 10 C.F.R. § 2.788 and
Fed. R. App. P. 18. See Superior Trucking Co., Inc. v.
United States, 614 F.2d. 481, 485 (5th Cir. 1980).

1 approach is to attempt to suppress it. Such a tactic cannot
2 be permitted.

3 The Governor's motion must be rejected.

4 Respectfully submitted,

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21 Dated: October 14, 1981

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NUCLEAR REGULATORY COMMISSION

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) 50-323
(Diablo Canyon Power Plant,)
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_____)

CERTIFICATE OF SERVICE

I hereby certify that copies of the "OPPOSITION OF LICENSEE PACIFIC GAS AND ELECTRIC COMPANY TO MOTION OF GOVERNOR EDMUND G. BROWN JR. TO STRIKE PORTION OF PG&E'S OPPOSITION TO STAY MOTION" have been served to the following on October 14, 1981, by U.S. mail, first class, except as otherwise noted.

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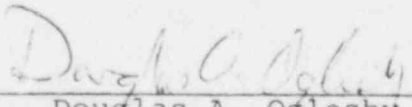
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